

1 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
3 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
4 the alleged violation was committed by a person acting under the color of state law. *See West v.*
5 *Atkins*, 487 U.S. 42, 48 (1988).

6 B. Plaintiff's Claims

7 Liberally construed, Plaintiff states cognizable claims of deliberate indifference to his
8 serious medical needs against Defendants CMO E. Tootell, Primary Care Physician Dr. Wu, Dr.
9 J. Grant, LVN Carolyn Lacy, and Dr. J. Espinoza-Marcus.

10 Plaintiff also names CDCR Secretary Matthew Cate and Warden R.R. Wong as
11 supervisors. A supervisor may be liable under section 1983 upon a showing of (1) personal
12 involvement in the constitutional deprivation, or (2) a sufficient causal connection between the
13 supervisor's wrongful conduct and the constitutional violation. *Starr v. Baca*, 652 F.3d 1202,
14 1207 (9th Cir. 2011). Supervisory defendants are entitled to qualified immunity where the
15 allegations against them are simply "bald" or "conclusory" because such allegations do not
16 "plausibly" establish the supervisors' personal involvement in their subordinates' constitutional
17 wrong. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-52 (2009) (noting no vicarious liability under
18 Section 1983 or *Bivens* actions). It is insufficient for a plaintiff only to allege that supervisors
19 knew about the constitutional violation and that they generally created policies and procedures
20 that led to the violation, without alleging "a *specific* policy" or "a *specific* event" instigated by
21 them that led to the constitutional violations. *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir.
22 2012) (emphasis in original). Here, Plaintiff does not mention Defendants Cate or Wong in his
23 statement of the claim. Accordingly, Defendants Cate and Wong are DISMISSED with leave to
24 amend if Plaintiff can allege the necessary specifics. *See id.*

25 Plaintiff also lists "Doe" Defendants. Although the use of "John Doe" to identify a
26 defendant is not favored in the Ninth Circuit, *see Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th
27 Cir. 1980), situations may arise where the identity of alleged defendants cannot be known prior
28 to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity

1 through discovery to identify the unknown defendants, unless it is clear that discovery would not
 2 uncover their identities or that the complaint should be dismissed on other grounds. *See id.*
 3 Should Plaintiff discover the identities of the Doe Defendants, he may move to amend his
 4 complaint to include them in this action at a later date.

5 To the extent Plaintiff intended to bring a retaliation claim, this claim is dismissed with
 6 leave to amend. “Within the prison context, a viable claim of First Amendment retaliation
 7 entails five basic elements: (1) An assertion that a state actor took some adverse action against
 8 an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled
 9 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
 10 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.
 11 2005) (footnote omitted). Plaintiff appears to claim that Defendant LVN Lacy retaliated against
 12 him by being hostile to him, and cutting off all of his medications. However, outside of
 13 Plaintiff’s bald assertion that there is some causal connection between Defendant LVN Lacy’s
 14 actions and Plaintiff’s protected conduct of filing grievances and complaints, the Court cannot
 15 find a reasonable inference showing that the grievances and complaints were substantial or
 16 motivating factors of Defendant LVN Lacy’s actions. To prevent a dismissal of claims,
 17 “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell*
 18 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-56 (2007) (citations omitted). Plaintiff will be
 19 given an opportunity to amend this claim, if he can do so in good faith. *See Lopez v. Smith*, 203
 20 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

21 CONCLUSION

22 For the foregoing reasons, the Court hereby orders as follows:

23 1. Defendants Cate and Wong are DISMISSED WITH LEAVE TO AMEND.
 24 Plaintiff’s retaliation claim is DISMISSED WITH LEAVE TO AMEND. If Plaintiff believes he
 25 can cure the above-mentioned deficiencies in good faith, Plaintiff shall file an AMENDED
 26 COMPLAINT within **thirty days** from the date this order is filed to cure the deficiencies
 27 described above. The amended complaint must include the caption and civil case number used
 28 in this order (C 12-0979 LHK (PR)) and the words AMENDED COMPLAINT on the first page.

1 Plaintiff may not incorporate material from the prior complaint by reference. **Failure to file an**
 2 **amended complaint within thirty days and in accordance with this order will result in the**
 3 **Court proceeding only with the deliberate indifference claims.**

4 Plaintiff is advised that an amended complaint supersedes the original complaint. “[A]
 5 plaintiff waives all causes of action alleged in the original complaint which are not alleged in the
 6 amended complaint.” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

7 Defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*
 8 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

9 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
 10 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint
 11 and all attachments thereto (docket no. 1), and a copy of this Order to **CMO E. Tootell,**
 12 **Primary Care Physician Dr. Wu, Dr. J. Grant, LVN Carolyn Lacy, and Dr. J. Espinoza-**
 13 **Marcus at Pelican Bay State Prison.**

14 The Clerk of the Court shall also mail a courtesy copy of the complaint and a copy of this
 15 Order to the California Attorney General’s Office. Additionally, the Clerk shall mail a copy of
 16 this Order to Plaintiff.

17 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
 18 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.
 19 Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on
 20 behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear
 21 the cost of such service unless good cause is shown for their failure to sign and return the waiver
 22 form. If service is waived, this action will proceed as if Defendants had been served on the date
 23 that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required
 24 to serve and file an answer before **sixty (60) days** from the date on which the request for waiver
 25 was sent. (This allows a longer time to respond than would be required if formal service of
 26 summons is necessary.) Defendants are asked to read the statement set forth at the bottom of the
 27 waiver form that more completely describes the duties of the parties with regard to waiver of
 28 service of the summons. If service is waived after the date provided in the Notice but before

Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

4. No later than **ninety (90) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the cognizable claims in the complaint.

a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If Defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the Court prior to the date the summary judgment motion is due.**

5. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **twenty-eight (28) days** from the date Defendants' motion is filed.

a. In the event Defendants file an unenumerated motion to dismiss under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the defendant's

¹ The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See *Wyatt v. Terhune*, 315 F.3d at 1120 n.14.

1 declarations and documents and show that you have in fact exhausted your
 2 claims. If you do not submit your own evidence in opposition, the motion to
 dismiss, if appropriate, may be granted and the case dismissed.

3 b. In the event Defendants file a motion for summary judgment, the
 4 Ninth Circuit has held that the following notice should be given to plaintiffs:

5 The defendants have made a motion for summary judgment by which they
 6 seek to have your case dismissed. A motion for summary judgment under Rule
 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

7 Rule 56 tells you what you must do in order to oppose a motion for
 8 summary judgment. Generally, summary judgment must be granted when there is
 9 no genuine issue of material fact – that is, if there is no real dispute about any fact
 10 that would affect the result of your case, the party who asked for summary
 judgment is entitled to judgment as a matter of law, which will end your case.
 11 When a party you are suing makes a motion for summary judgment that is
 properly supported by declarations (or other sworn testimony), you cannot simply
 12 rely on what your complaint says. Instead, you must set out specific facts in
 declarations, depositions, answers to interrogatories, or authenticated documents,
 as provided in Rule 56(e), that contradict the facts shown in the defendants'
 13 declarations and documents and show that there is a genuine issue of material fact
 for trial. If you do not submit your own evidence in opposition, summary
 judgment, if appropriate, may be entered against you. If summary judgment is
 14 granted in favor of defendants, your case will be dismissed and there will be no
 trial.

15 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
 16 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
 17 (1986) (holding party opposing summary judgment must come forward with evidence showing
 18 triable issues of material fact on every essential element of his claim).

19 6. Defendants shall file a reply brief no later than **fourteen (14) days** after
 20 Plaintiff's opposition is filed.

21 7. The motion shall be deemed submitted as of the date the reply brief is due. No
 22 hearing will be held on the motion unless the Court so orders at a later date.

23 8. All communications by the Plaintiff with the Court must be served on Defendants
 24 or Defendants' counsel, by mailing a true copy of the document to Defendants or Defendants'
 25 counsel.

26 9. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
 27 No further Court order is required before the parties may conduct discovery.

28 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court

1 and all parties informed of any change of address and must comply with the Court's orders in a
2 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
3 pursuant to Federal Rule of Civil Procedure 41(b)

4 IT IS SO ORDERED.

5 DATED: 6/22/12


LUCY H. KOH
United States District Judge